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on behalf of themselves and all others similarly situated

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

PATRICK COTTER, ALEJANDRA MACIEL, and JEFFREY KNUDTSON, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

LYFT, INC.,

Defendant.

Case No.: 3:13-cv-04065-VC

Hon. Vince Chhabria

NOTICE OF MOTION AND MOTION AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF REVISED CLASS ACTION SETTLEMENT

Hearing Date: December 1, 2016
Time: 10:00 a.m.
Courtroom: 4

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TO DEFENDANT AND ITS ATTORNEYS OF RECORD: PLEASE TAKE NOTICE that on Thursday, December 1, 2016, at 10:00 a.m., or as soon thereafter as the matter can be heard before the Honorable Vince Chhabria, in Courtroom 4, 17th Floor, U.S. District Court, Northern District of California, located at 450 Golden Gate Avenue, San Francisco, CA, 94102, Plaintiffs will and hereby do move the Court pursuant to Federal Rule of Civil Procedure 23 for an Order granting final approval of the parties' settlement agreement and entering final judgment in this matter.

This Motion is based on this Notice of Motion and Motion; the Memorandum of Points and Authorities below; the Declaration of Shannon Liss-Riordan (Dkt. No. 272-1); the Declaration of Matthew D. Carlson (Dkt. No. 272-2); the Declaration of Settlement Administrator Loree Kovach filed concurrently herewith; all supporting exhibits filed herewith; all other pleadings and papers filed in this action; and any argument or evidence that may be presented at the hearing in this matter.

I. INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 23(e), Plaintiffs Patrick Cotter, Alejandra Maciel, and Jeffrey Knudtson hereby request that the Court finally approve the class action settlement between Plaintiffs, on behalf of similarly situated Lyft drivers, and Defendant Lyft, Inc. ("Lyft").

The Court previously reviewed the parties' settlement agreement with the rigor and scrutiny applicable at the final approval stage in its order granting preliminary approval of the settlement. Dkt. No. 246 at p. 8 ("district courts should review class action settlements just as carefully at the initial stage as they do at the final stage"); *see also id.* at pp. 5-6 (setting forth final approval factors). Nothing has changed since that time that should alter the Court's conclusion that the settlement is "fair, reasonable, and adequate." *Id.* at p. 13.

II. RELEVANT FACTS

The Court is well-acquainted with the history of this litigation and considerations leading to settlement, detailed in Plaintiffs' Motions for Preliminary Approval of Class Action Settlement and subsequent filings (*e.g.*, Dkt. Nos. 169, 206, 232, 235). The Court is also familiar with the provisions of the parties' settlement agreement itself. Dkt. No. 206-1 ("Agreement"). Accordingly, Plaintiffs focus here primarily on the parties' compliance with the notice requirements detailed in the Court's preliminary approval order (Dkt. 256) and the results of that notice process:

Following preliminary approval, the Class Notice was distributed by email on August 30, 2016.[1] The response rate to date in this case has been strong, with 63,447 Class Members

[1] As described in the accompanying declaration by the Settlement Administrator, Loree Kovach of Garden City Group, the Class Notice appears to have reached 99.6% of the class. Kovach Decl. at ¶ 9. From the initial emailed notice distribution, 4,190 email notices bounced back, and the Settlement Administrator mailed paper notices to the 4,178 of these individuals who had physical mailing addresses on file with Lyft. Kovach Decl. at ¶¶ 5-6. Just 352 paper notices remain undeliverable to date. Kovach Decl. at ¶¶ 7-8.

having submitted claims as of November 16, 2016. Kovach Decl. at ¶¶ 10-13.[2] A chart showing the distribution of claims submitted to date, and current estimated payouts, is attached to the declaration of the Settlement Administrator. *See* Kovach Decl., Exh. D (p. 21). Based on current estimates, drivers who have driven the most hours (more than 2,000) may receive payments exceeding $11,000 (if they qualify as "full-time" drivers) and exceeding $5,500 (for other drivers). *Id.* As Plaintiffs had anticipated, these estimates are more than double the estimates presented to the Court in connection with preliminary approval. *Id.*[3] Sixty-five Class Members have timely opted out of the settlement, and only eight Class Members have submitted objections. Kovach Decl. at ¶¶ 21-22; 19-20.

A reminder email was sent out on November 4, 2016, to all those class members who had not yet submitted claims. Kovach Decl. at ¶ 14; Exhs. E, F. In addition, a paper notice was mailed on November 11, 2016, to all Class Members who had not yet submitted claims whose settlement shares may exceed $200. *Id.* Pursuant to the parties' agreement, additional efforts will continue to be made to encourage Class Members to submit claims to participate in the settlement, particularly Class Members with significant settlement shares. Agreement at ¶ 63.[4]

Pursuant to the preliminary approval order, Class Members were given until October 29, 2016, to submit a claim form, opt-out of the settlement, or submit any objections to the

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[2] As explained by the Settlement Administrator, to date, 31.3% of Class Members have filed claims. Because Class Members who have larger settlement shares have filed claims at a higher rate than Class Members with smaller settlement shares, the claims filed to date account for more than this percentage of the Net Settlement Fund; instead, the claims filed to date represent 41.1% of the fund (if there were to be 100% participation). Kovach Decl. at ¶ 13.

[3] Claims will continue to be accepted after the final approval hearing and up to the time of the residual distribution. Thus, these estimates (which include both initial and residual distribution amounts) will decrease somewhat.

[4] Another email notice is being sent to all Class Members today, which both reminds Class Members who have not yet claimed their shares to do so and also informs Class Members that Plaintiffs' counsel's fee petition has now been filed and that any objections to that petition may still be submitted before the final approval hearing. Kovach Decl. at ¶ 15, Exh. G.

settlement. *See* Kovach Decl. at ¶¶ 21; Exhs. A, B (distributed Class Notice) at ¶ 12. As of November 16, 2016, 63,447 Class Members had submitted claims. Kovach Decl. at ¶ 10. Out of a total class of 202,518 drivers, 65 Class Members have timely opted out, and eight Class Members have objected to the settlement. Kovach Decl. at ¶¶ 19-22.[5]

Pursuant to the parties' agreement, the initial payment of settlement proceeds will be paid shortly after final approval of the settlement, if there is no appeal.[6] Agreement at ¶¶ 50, 79. Six months following the initial distribution, a final distribution of unclaimed funds will be made to class members who have submitted claims to participate. *Id.* No portion of the settlement funds will revert to Lyft. *Id.*

Payments will be deposited directly to all participating Class Members' bank accounts (unless they elected to receive a paper check). Shares will be calculated in proportion to the points-system formula set forth in the parties' agreement, *see* Agreement at ¶ 46, with a small fund of $100,000 held back from the initial distribution to be used to resolve any disputes that may arise with respect to the settlement distribution. *See* Agreement at ¶¶ 24(k), 52. After six months, any remaining unclaimed funds will be re-distributed to Class Members in proportion to their initial distribution[7], and if any of these remaining funds are not successfully disbursed, the balance of unclaimed funds will go to the Legal Aid Society-Employment Law Center in San Francisco as a *cy pres* beneficiary. Agreement at ¶ 79.[8] Thus, the proceeds of the settlement

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[5] For privacy purposes, the names of the drivers who opted out have been redacted, but the parties will have the list available for the Court at the hearing.

[6] The payment will be 90 days after the Court's final approval order and any appeals are resolved. Agreement at ¶¶ 24(n),(u), 50, 79.

[7] The residual distribution will be calculated so that all remaining funds will be distributed to Class Members who have claimed, but only those for whom the residual share would be at least $50. Agreement at ¶ 50.

[8] Thus, very little of the funds will go to *cy pres*, as these will only be funds that, for instance, are paid by check but not cashed (despite reasonable efforts to encourage Class Members to cash their checks), or are paid electronically but whose accounts are no longer active (despite reasonable efforts to obtain updated account information).

(less incentive payments for the lead Plaintiffs, attorneys' fees and costs, and the amount payable to the Labor and Workforce Development Agency "LWDA" pursuant to the parties' PAGA allocation) will be paid out to Class Members, and no portion of the settlement funds will revert to Lyft. *Id.*

III. LEGAL STANDARD

A class action may be settled only with the court's approval. Fed. R. Civ. P. 23(e). "Approval under 23(e) involves a two-step process in which the Court first determines whether a proposed class action settlement deserves preliminary approval and then, after notice is given to class members, whether final approval is warranted." *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 525 (C.D. Cal. 2004). At the final approval stage, the primary inquiry is whether the proposed settlement "is fundamentally fair, adequate, and reasonable." *Lane v. Facebook, Inc.*, 696 F.3d 811, 818 (9th Cir. 2012); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). "It is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness." *Hanlon*, 150 F.3d at 1026 (citing *Officers for Justice v. Civil Serv. Comm'n of S.F.*, 688 F.2d 615, 628 (9th Cir. 1982)).

In making the inquiry, the court must be mindful that the law favors the compromise and settlement of class action suits. *See, e.g., In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008); *Churchill Village, LLC. v. Gen. Elec.*, 361 F.3d 566, 576 (9th Cir. 2004); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992); *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982).

IV. DISCUSSION

Evaluating a settlement proposal at the final approval stage requires the district court to balance a number of factors: (1) the strength of the plaintiffs' case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and views of counsel; (7) the

presence of a governmental participant; (8) and the reaction of the class members to the proposed settlement. *Hanlon*, 150 F.3d at 1026.

In this case, the Court has eschewed "kicking the can down the road" and has already evaluated most of the information necessary to apply the final approval standard to the parties' settlement agreement. Dkt. No. 246 at p. 8. Nothing has changed since the Court preliminarily approved the settlement that would require it to reconsider its approval. Plaintiffs briefly recap the reaction to the proposed settlement as it relates to the *Hanlon* factors.

A. The Positive Reaction of the Class Weighs in Favor of Final Approval.

"It is established that the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members." *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528–29 (C.D.Cal.2004).

Here, the Court received objections from just *eight* of the 202,030 Class Members who received the Class Notice – .003% of the Class. By any standard, this lack of objection of the Class Members favors approval of the Settlement. *See, e.g., Churchill Village LLC v. Gen. Elec.*, 361 F.3d 566, 577 (9th Cir.2004) (affirming settlement with 45 objections out of 90,000 notices sent); *Wren v. RGIS Inventory Specialists*, 2011 WL 1230826, at *11 (N.D. Cal. Apr. 1, 2011), *supplemented*, 2011 WL 1838562 (N.D. Cal. May 13, 2011) (granting final approval where "only 16 class members—constituting 0.02%—have filed objections to the proposed settlement"); *In re Omnivision Technologies, Inc.*, 559 F.Supp.2d 1036, 1043 (N.D. Cal. 2008) (stating that objections from 3 out of 57,630 Class Members favors approval of the Settlement "by any standard"); *Rodriguez v. West Publ. Corp.*, 2007 WL 2827379, at *10, (C.D. Cal. Sept. 10, 2007) (54 objections out of 376,000 notices); *Scovil v. FedEx Ground Package Sys., Inc.*, No. 1:10-CV-515-DBH, 2014 WL 1057079, at *1 (D. Me. Mar. 14, 2014) (granting final approval where "13 of 141 plaintiffs (9.2%) did file objections").

Here, as set forth in more detail in Plaintiffs' Response to Objections, the objections to the settlement generally lack substance and should be overruled. Moreover, a "settlement is not

unfair simply because a large number or a certain percentage of class members oppose it, as long as it is otherwise fair, adequate, and reasonable." *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 616, 624 (N.D. Cal. 1979) (approving class settlement over the objection of 160 class members representing approximately 16 percent of the class). "To hold otherwise would put too much power in the hands of a few persons having no right to a preferred position in settlement, to thwart a result that might be in the best interests of the class." *Id.* at 624.[9]

Given the tiny number of objections out of a large class of more than 200,000 Lyft drivers, this factor clearly weighs in favor of final approval. *Hanlon*, 150 F.3d at 1027 ("the fact that the overwhelming majority of the class willingly approved the offer and stayed in the class presents at least some objective positive commentary as to its fairness.").

B. As this Court Has Already Found, The Remaining Hanlon Factors Favor Final Approval.

1. The Strength of Plaintiffs' Case

"The initial fairness factor addresses Plaintiffs' likelihood of success on the merits and the range of possible recovery." *Franco v. Ruiz Food Prod., Inc.*, 2012 WL 5941801, at *11 (E.D. Cal. Nov. 27, 2012). "There is no particular formula by which that outcome must be tested." *Moore v. PetSmart, Inc.*, 2015 WL 5439000, at *5 (N.D. Cal. Aug. 4, 2015), *appeal dismissed* (July 27, 2016). Indeed, "determining the probability and likelihood of a plaintiff's success on the merits of a class action litigation, 'the district court's determination is [often] nothing more than an amalgam of delicate balancing, gross approximations and rough justice.'" *Id.* (quoting *Officers for Justice v. Civil Serv. Comm'n of City & Cty. of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982)).

[9] By comparison, Judge Chen recently denied preliminary approval of the proposed settlement in *O'Connor v. Uber Technologies, Inc.*, 2016 WL 4398271 (N.D.Cal., 2016). There, 66 class members (out of a class of approximately 400,000) submitted objections. *See id.* at *16. However, Judge Chen noted that it was not the presence of these objections that led to him not approving the settlement. *Id.* It was instead the calculation of PAGA penalties, an issue that this Court likewise analyzed and reached a different conclusion. *Id.* at *17; *compare* Dkt. No. 246 at p. 9; *see also* Plaintiffs' Response to Objections.

Here, Plaintiffs have submitted to the Court their good faith valuation of claims, Dkt. No. 206 at ¶¶ 2-35, and the Court has concluded that this valuation is reasonable. Dkt. No. 246 at p. 10 (reasoning that "what matters is…whether the settlement as a whole is reasonable in light of the strength and value of all the claims being released" and granting preliminary approval).[10] Moreover, counsel's analysis of the value of Plaintiffs' non-reimbursement claims – essentially the same claims released in the *O'Connor* settlement – was expressly approved in Judge Chen's ruling, in which he found that it was "reasonable for Plaintiffs' counsel to assign no or little value" to claims other than those for reimbursement, gratuities, and overtime, and that "the parties' assessment of the value of all the non-PAGA claims is reasonably accurate." *O'Connor*, 2016 WL 4398271, at *13-14.

Of course, evaluating the "strengths" of Plaintiffs' claims is not solely an assessment of the raw amount of money that could be recovered, assuming a clean sweep at trial; it must also consider Plaintiffs' likelihood of succeeding on the merits. *Franco*, 2012 WL 5941801, at *11. In this case, the Court noted there was a real risk that a jury would not find for the Plaintiffs. *See* Dkt. No. 94 at p. 19 (stating that "the jury in this case will be handed a square peg and asked to choose between two round holes."). The Court also recognized the risk to Plaintiffs that 99.5% of the Class consists of part-time (or less) drivers, who, in the Court's view, had a smaller likelihood of success on the misclassification issue than the "full time" drivers. Lyft would doubtlessly emphasize that any driver is free to pick his or her own schedule and any driver is free to log on and off from driving at will (unlike in a part time shift, where workers are

[10] Lyft has made clear that it would argue that a jury should be permitted to reimburse drivers only for their "variable" mileage reimbursement expenditures (which includes expenses that fluctuate month to month, such as the costs of gas, maintenance, and tires), not their fixed expenditures (which includes expenses that do not vary over time from month to month, including depreciation and insurance). In other words, Lyft would argue that a driver using his or her own car would have had to pay for insurance and depreciation whether or not he or she drove for Lyft, whereas variable costs like gas and wear and tear are more directly attributable to driving for Lyft. If Lyft had succeeded in this argument, it could potentially have reduced the value of this claim by at least **half** (*e.g.*, the variable rate has varied from 19 to 24 cents per mile during the applicable timeframe, whereas the standard rate of has varied from 54 to 57.5 cents per mile).

required to work the duration of their shifts). Although Plaintiffs disagreed that the drivers' ability to set their schedule meant they are not employees, Plaintiffs faced the challenge of placing this novel issue before a lay jury. More generally, Plaintiffs would be tasked with convincing a jury comprised of individuals who have likely used Lyft or Uber, who have likely had positive experiences doing so, and who may be hesitant to deliver a verdict that could be potentially devastating to the company.

The Plaintiffs also faced serious risk due to Lyft's arbitration provisions. While the Ninth Circuit's decision in *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016), is an important development in the ongoing battle regarding the enforceability of class action waivers in arbitration clauses, the decision (which was issued *after* the Plaintiffs reached the settlement in this case[11]) does not fully answer the question here. First, in *Morris*, the defendant had waived any argument that the NLRA did not apply to the plaintiff-workers, whereas here, Lyft would argue that the drivers are properly classified as independent contractors under the NLRA and so the *Morris* holding does not apply. In order to benefit from *Morris*, Plaintiffs would have needed to establish that they were employees under the NLRA (which contains a similar, but not identical, standard to the California *Borello* test). Whether they could succeed in this endeavor simply leads back to the question of the strengths of Plaintiffs' misclassification arguments. Although Plaintiffs felt confident in their argument, their success was not assured. Second, the Supreme Court has not yet ruled on this issue of whether class action waivers violate the NLRA, and if so whether the FAA would for some reason trump the NLRA on this question. Although Plaintiffs agree with the outcome of the *Morris* decision, there is a Circuit split on this issue and no guarantee on what result will ultimately be reached at the Supreme

[11] At the time the parties reached their revised settlement, the Ninth Circuit, while not having decided the NLRA/*D.R. Horton* issue, had most recently cast doubt on the viability of the argument in this Circuit. *Richards v. Ernst & Young, LLP*, 744 F.3d 1072, 1075, n.3 (9th Cir. 2013).

Court. Plaintiffs thus faced uncertainty as to whether a significant class (or any class) would ultimately be permitted to proceed on these claims in court.[12]

For these reasons and those the Court addressed at length in its preliminary approval order, the risks Plaintiffs faced in this case well justify final approval of the significant result reached here.

2. The Risk, Expense, Complexity, and Likely Duration of Continued Litigation

This factor considers "'the probable costs, in both time and money, of continued litigation.'" *Ching v. Siemens Indus., Inc.*, 2014 WL 2926210, at *4 (N.D. Cal. June 27, 2014) (citing particularly *In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D. 231, 254 (D. Del. 2002), *aff'd*, 391 F.3d 516 (3d Cir. 2004)).[13] Thus, "unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results." *Franco v. Ruiz Food Prod., Inc.*, 2012 WL 5941801, at *12 (E.D. Cal. Nov. 27, 2012) (citing *DIRECTV, Inc.*, 221 F.R.D. at 526).

Here, although the parties have covered considerable ground in this case to date, there remained extensive and complex litigation to follow had the settlement not been reached. For example, the parties had yet to submit class certification briefing and inevitable briefing on motions to compel arbitration (which likely would have resulted in multiple appeals to the Ninth Circuit as of right under the FAA or pursuant to Fed. R. Civ. P. 23(f), *see O'Connor v. Uber Techs. Inc.*, Civ. A. No. 13-3826 (in which 5 separate appeals and cross-appeals are currently pending before the Ninth Circuit)). Likewise, had the parties reached the trial stage, this case promised to present a costly and complicated jury trial that would likely span several weeks and necessitate extensive and costly pre-trial preparation. Then, following trial, there would

[12] Further, Plaintiffs also faced uncertainties regarding class certification, given that the Ninth Circuit granted Rule 23(f) review of Judge Chen's class certification decision in *O'Connor v. Uber Techs., Inc.*, 311 F.R.D. 547 (N.D. Cal. 2015). *See* Ninth Cir. Appeal No. 16-15595 (appeal pending).

[13] To the extent this factor overlaps with the risk considerations discussed above, Plaintiffs incorporate their previous analysis into this discussion.

undoubtedly have been appeals. The length, expense, and uncertainty surrounding future litigation, therefore, weighs in favor of final approval.

3. The Risk of Maintaining Class Action Status

As discussed above, the Plaintiffs faced risk in maintaining class action status through trial, particularly in light of the likelihood of appeals relating to enforcement of Lyft's arbitration agreement. Other courts have recognized these risks as weighing in favor of granting final approval to class action settlements. *See, e.g.*, *Ching v. Siemens Indus., Inc.*, 2014 WL 2926210, at *4 (N.D. Cal. June 27, 2014) ("Plaintiff has identified several meritorious arguments that Defendants could raise to class certification in the event this lawsuit was to proceed" such that "[g]iven the risk in obtaining and maintaining class certification, the Court finds that this factor weighs in favor of approving the settlement"); *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 966 (9th Cir. 2009) (noting that "[a] district court may decertify a class at any time" such that even after class certification, "the risk remained that the nationwide class might be decertified" and this factor therefore weighed in favor of settlement); *Moore v. PetSmart, Inc.*, No. 5:12-CV-03577-EJD, 2015 WL 5439000, at *6 (N.D. Cal. Aug. 4, 2015), *appeal dismissed* (July 27, 2016) ("[T]he notion that a district court could decertify a class at any time is an inescapable and weighty risk that weighs in favor of a settlement").

4. The Amount Offered in Settlement

In its order denying the parties' motion for preliminary approval of the original settlement, the Court determined that a reasonable settlement value would be approximately 17% of the value of Plaintiffs' reimbursement claims as of March 24, 2016 (approximately $156 million). Dkt. No. 200 at n. 4. The parties' revised settlement exceeds this figure by approximately $500,000, and improves upon the parties' original non-monetary terms of settlement. This Court has previously determined this revised amount offered (both monetary and non-monetary) was fair, reasonable, and adequate. Dkt. No. 246 at p. 13 ("the value of the proposed settlement (both monetary and nonmonetary) to the Class Members, the Court

concludes that the settlement, on the current record, is 'fair, reasonable, and adequate' within the meaning of Rule 23(e)(2).")

Nothing has changed since then to alter the Court's determination. First, the changes to Lyft's Terms of Service are valuable to drivers, as described in detail in Plaintiffs' previous briefing and their forthcoming Response to Objections. Second, Lyft is implementing its commitment regarding the day-to-day benefits conferred by the settlement. Pursuant to its agreement to provide drivers with additional information concerning ride requests, Lyft has agreed to give drivers the estimated time of arrival to pick up potential riders. Drivers have not previously had this information, and can now, for example, use it to determine whether they feel like sitting in traffic to pick up a passenger.[14] Accordingly, the amount offered in settlement continues to weigh in favor of final approval.

5. The Extent of Discovery Completed

For the parties "to have brokered a fair settlement, they must have been armed with sufficient information about the case to have been able to reasonably assess its strengths and value." *Acosta v. Trans Union, LLC*, 243 F.R.D. 377, 396 (C.D. Cal. 2007). "A settlement following sufficient discovery and genuine arms-length negotiation is presumed fair." *Nat'l Rural Telecommunications Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004).

Here, the parties have exchanged extensive information necessary to make an informed evaluation of the case. *See* Liss-Riordan Decl. at ¶ 16; Carlson Decl. at ¶ 14. Specifically, Plaintiffs have taken three depositions of Lyft's persons most knowledgeable regarding eight different topics and 25 subtopics. Carlson Decl. at ¶ 14. Plaintiffs propounded and received responses to 79 narrowly tailored document requests, 66 interrogatories, and 13 requests for

[14] Additionally, pursuant to Lyft's agreement to implement a "favorite driver" program, Lyft has committed to including a button in ride receipts that allows passengers to identify drivers as their favorites. Favorite drivers in California will have a regular opportunity to receive additional benefits from Lyft, which initially will be gift card-based prizes that can be used like cash and that will be provided each quarter to a random selection of the favorite California drivers.

admission. *Id.* At the time the parties reached this settlement, additional depositions pursuant to Rule 30(b)(6) concerning nine additional topics, ten interrogatories, eight document requests, and a third party deposition subpoena issued to a former Lyft manager were pending. *Id.* Plaintiffs' discovery elicited information necessary to defeat Lyft's motion for summary judgment and likely would have been sufficient to successfully move for class certification. Liss-Riordan Decl. at ¶ 16.

Conversely, Lyft has propounded substantial written discovery to each of Plaintiffs Cotter (185 document requests, 35 interrogatories, 38 requests for admission), Maciel (181 document requests, 35 interrogatories, 38 requests for admission), and Knudtson (23 document requests, 20 interrogatories, 36 requests for admission). Carlson Decl.at ¶¶ 22-25. Plaintiffs searched for and provided numerous documents (250 by Cotter, 275 by Maciel, and 1,202 by Knudtson). *Id.* Additionally, Cotter and Maciel were each deposed for a full day. *Id.*

Additionally, the parties participated in five different settlement conferences with Magistrate Judge Ryu over the course of nearly one year. In connection with these conferences, Lyft provided the data necessary for Plaintiffs to value the extent of damages and/or penalties that they believed would be at issue at trial. Liss-Riordan Decl. at ¶ 16.

In sum, Plaintiffs had a very good idea of what the future of this case would hold: a contested motion for class certification that would likely go in Plaintiffs' favor, followed by appeals and cross-appeals concerning an order granting class certification; a motion to compel individual arbitration following resolution of the class certification issue, followed by appeals and cross-appeals concerning that order; and ultimately one day a trial followed by numerous post-trial motions and appeals relating to the merits of the case. Liss-Riordan Decl. at ¶ 29. Accordingly, both sides were well-armed with the information necessary to reach a reasonable compromise. *Id.*; *see also DIRECTV, Inc.*, 221 F.R.D. at 528 ("the proposed settlement was reached only after the parties had exhaustively examined the factual and legal bases of the disputed claims" and "[t]his fact strongly militates in favor of the Court's approval of the settlement.").

6. The Experience and Views of Counsel

The Ninth Circuit has noted that "[p]arties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in litigation." *Rodriguez*, 563 F.3d at 967. As such, "[a] district court is 'entitled to give consideration to the opinion of competent counsel that the settlement [is] fair, reasonable, and adequate.'" *Ching v. Siemens Indus., Inc.*, 2014 WL 2926210, at *5 (N.D. Cal. June 27, 2014) (quoting *Isby v. Bayh*, 75 F.3d 1191, 1200 (7th Cir. 1996)).

Here, counsel believes the settlement is in the best interests of the class and provides substantial monetary benefits as well as meaningful non-monetary policy changes that will benefit drivers going forward. Liss-Riordan Decl. at ¶ 30.

7. Presence of a Governmental Participant

Most courts have granted final approval to settlements that settle PAGA claims without directly addressing the "governmental participant" factor; instead, they have typically weighed the appropriateness of the PAGA allocation to the LWDA as part of the overall amount offered in settlement.[15]

[15] *See, e.g., Moore v. PetSmart, Inc.*, 2015 WL 5439000, at *8 (N.D. Cal. Aug. 4, 2015), *appeal dismissed* (July 27, 2016) (granting final approval of settlement that included $37,500 allocation to LWDA to settle PAGA claims out of $10 million settlement without separately assessing the "governmental participant" factor); *Elliott v. Rolling Frito-Lay Sales, LP*, 2014 WL 2761316, at *8 (C.D. Cal. June 12, 2014) (in assessing settlement that included PAGA claims, Court noted that "[t]here is no governmental participant in this action [but] [t]he settlement does provide for the appropriate payment of $5,000 (with 25 percent flowing to the class) to the Labor & Workforce Development Agency ('LWDA') under PAGA"); *Ching v. Siemens Indus., Inc.*, 2014 WL 2926210, at *5 (N.D. Cal. June 27, 2014) (granting final approval to settlement that included $3,750 for the LWDA out of a $425,000 settlement without separately addressing the LWDA as a "governmental participant"); *Torchia v. W.W. Grainger, Inc.*, 304 F.R.D. 256, 263, n. 2 (E.D. Cal. 2014) (granting final approval to settlement that included $7500 for the LWDA to settle PAGA claims out of a $1.3 million net settlement and noting that the governmental participant factor "does not weigh in the Court's analysis because the government is not a party in this action"); *Franco v. Ruiz Food Prod., Inc.*, 2012 WL 5941801, at *13-14 (E.D. Cal. Nov. 27, 2012) (granting final approval of settlement at included $7,500 for the LWDA to settle PAGA claims out of a $2.5 million settlement, and assessing the reasonableness of the PAGA allocation without addressing the "governmental participant" factor).

As the Court has already concluded that the "$1 million settlement figure for the PAGA claims is reasonable," Dkt. 246 at p. 9, it need not engage in any further analysis of the "governmental participant" factor.[16] Additionally, Plaintiffs note that the LWDA has never intervened in this matter (despite four opportunities to do so), and has not objected to the settlement.

C. The *Bluetooth* Factors Favor Final Approval

The Ninth Circuit has held that when a settlement agreement is negotiated prior to contested class certification, courts must show not only a comprehensive analysis of the *Hanlon* factors, but also that the settlement did not result from collusion among the parties. *Destefano v. Zynga, Inc.*, 2016 WL 537946, at *8 (N.D. Cal. Feb. 11, 2016) (citing *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 946-47 (9th Cir. 2011)). Thus, the Court must examine the settlement for three subtle "warning signs" of collusion: "(1) whe[ther] class counsel receives a disproportionate distribution of the settlement, or [] the class receives no monetary distribution but counsel is amply awarded[;] (2) whe[ther] the parties negotiate a 'clear sailing' arrangement providing for the payment of attorneys' fees separate and apart from class funds without objection by the defendant …[;] and (3) whe[ther] the parties arrange for fees not awarded to

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Those courts that have devoted separate consideration to this factor generally just note that a PAGA payment is being made to the LWDA. *See, e.g., Adoma v. Univ. of Phoenix, Inc.*, 913 F. Supp. 2d 964, 977 (E.D. Cal. 2012) (noting in its assessment of the "governmental participant" factor that "the settlement will result in a $50,000 payment to the California Labor and Workforce Development Agency. This factor weighs in favor of approval."). *See also McKenzie v. Fed. Exp. Corp.*, 2012 WL 2930201, at *6 (C.D. Cal. July 2, 2012) (noting in its assessment of the "governmental participant" factor that "California's LWDA is a government entity affected by this action" and that the plaintiffs had complied with all statutory notice requirements and provided for a reasonable allocation of $82,500 to the LWDA for civil penalties such that "this factor weighs in favor of granting final approval").

[16] For the reasons discussed at length in Plaintiffs' Responses to Objections, this Court properly decided this issue on preliminary approval and should not be swayed by Judge Chen's ruling in *O'Connor* on this issue.

revert to defendants rather than to be added to the class fund." *Zynga, Inc.*, 2016 WL 537946, at *9. Even where one or more of the signs outlined above is present, however, "the presence of these factors is in no way dispositive." *In re TracFone Unlimited Serv. Plan Litig.*, 112 F. Supp. 3d 993, 1007 (N.D. Cal. 2015), *reconsideration denied*, 2015 WL 4735521 (N.D. Cal. Aug. 10, 2015) (granting final approval to this settlement despite the presence of two of *Bluetooth 's* three warning signs). Instead, "the *Bluetooth* factors are merely 'warning signs' that indicate the *potential* for collusion" and "the Court is merely obligated to assure itself that the fees awarded in the agreement were not unreasonably high in light of the results obtained for class members." *Id.*

Here, the first factor – whether class counsel receives a disproportionate distribution of the settlement – is clearly not problematic. In common fund settlements, the Ninth Circuit sets a "benchmark" fee award at 25% of the recovery obtained. *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 949 (9th Cir. 2015). Plaintiffs' requested fee award here represents only 13.6% of the total $27 million settlement, which is well below the Ninth Circuit benchmark. *See also* Plaintiffs' Mot. for Fees at pp. 12-13.

Likewise, the second factor does not present a barrier to final approval. Although the parties' agreement does contain a "clear sailing" provision, *see* Dkt. 206-1 at ¶ 40, "a 'clear sailing provision does not signal the possibility of collusion where, as here, Class Counsel's fee will be awarded by the Court from the same common fund as the recovery to the class.'" *Smith*, 2016 WL 2909429, at *7 (quoting *In re High-Tech Employee Antitrust Litigation*, 2015 WL 5158730, at *14 (N.D. Cal. Sep. 2, 2015)); *see also Larsen v. Trader Joe's Co.*, 2014 WL 3404531, at *8 (N.D. Cal. July 11, 2014), *appeal dismissed* (Nov. 17, 2014) ("Under the second factor, clear sailing provisions generally do not raise concerns where, as here, the fees are to come from the settlement fund"). "The dominant risk with clear sailing provisions is that defendants might persuade class counsel to accept a lower payment to the class in exchange for a promise not to object to a (presumably higher) fee." *In re: Cathode Ray Tube (Crt) Antitrust Litig.*, 2016 WL 3648478, at *10 (N.D. Cal. July 7, 2016). However, where, as here, counsel's

fees will be awarded from a common fund and none of the money will revert to Lyft, the clear-sailing provision presents no concern because Lyft is paying the same fixed amount either way. In other words, such a provision is consistent with Lyft's "own interests in minimizing liability," and is not a sign of collusion. *Rodriguez*, 563 F.3d at n. 5.

Lastly, the agreement does not include a "kicker" provision that would allow unclaimed funds to revert to Lyft. *See e.g.*, *Ebarle v. Lifelock, Inc.*, 2016 WL 5076203, at *11 (N.D. Cal. Sept. 20, 2016) (noting that "[u[nlike n *In re Bluetooth Headset*, the $68 million fund is non-reversionary" and "[b]ecause there is no 'kicker' contained in the agreement, remaining money in the Settlement Fund does not revert to Defendant and instead is redistributed on a pro rata basis to the Class"); *Spann v. J.C. Penney Corp.*, 2016 WL 5844606, at *10 (C.D. Cal. Sept. 30, 2016) (noting that "the entire settlement amount will be distributed, and no funds will revert to defendant."); *Tadepalli v. Uber Techs., Inc.*, No. 15-CV-04348-MEJ, 2016 WL 1622881, at *9 (N.D. Cal. Apr. 25, 2016) ("The absence of a "kicker provision" in the parties' settlement and the fact that the class is receiving 100% of the fees incurred reduces the likelihood that the parties colluded to confer benefits on each other at the expense of class members"); *Larsen*, 2014 WL 3404531, at *8 ("As to the third factor, the Settlement Agreement provides that unclaimed fees do not revert to Trader Joe's, but will be distributed to class members through a product distribution in Trader Joe's stores").

V. CONCLUSION

For the foregoing reasons, the Court should grant final approval of the parties' settlement and enter the proposed order submitted herewith.

Dated: November 16, 2016

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By: ___/s/_Shannon Liss-Riordan_____
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